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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 849

JACOB SPEVAK, doing business as
J. SPEVAK AND COMPANY and GEORGE LERIAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION OF JACOB SPEVAK, DOING BUSINESS AS J. SPEVAK AND COMPANY AND GEORGE LERIAN FOR A WRIT OF CERTIORARI TO REVIEW JUDGMENTS ENTERED DECEMBER 6, 1946, BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AFFIRMING JUDGMENTS OF CONVICTION ON 31 COUNTS ENTERED JUNE 24, 1946, BY THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND ON CRIMINAL INFORMATION OF 40 COUNTS CHARGING VIOLATIONS OF U. S. C., TITLE 50 APP., SECS. 902 (a), 904 (a), 905 (b), REVISED MAXIMUM PRICE REGULATION 169, SECS. 1364. 401 (a), 1364. 451; 7 F. R. 10381, 8 F. R. 4844, 8 F. R. 7675. TO WIT.: SELLING MEAT IN EXCESS OF THE CEILING PRICE PURSUANT TO THE EMERGENCY PRICE CONTROL ACT OF 1942 AS AMENDED, AND BRIEF IN SUPPORT THEREOF.

NORMAN S. BOWLES, JR.,
SYMONE S. SPECTOR,
ROBERT E. COUGHLAN, JR.,
Attorneys for Petitioners.

The Daily Record Co., Baltimore 3, Md.

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. OPINION BELOW.

The District Court filed no opinion in the cases which were tried together. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit, dated December 6, 1946, has not as yet been officially reported, but will be contained in the record following page 235.

JURISDICTION.

The jurisdiction of this Court to issue a writ of certiorari to review the Judgments of the Circuit Court of Appeals, dated December 6, 1946, is invoked under Sec. 240 of the Judicial Code as amended (28 U. S. C. 347). See also Rule 38 of the Supreme Court, 28 U. S. C., following Sec. 354, and Rule 11 of the Rules of Practice and Procedure in Criminal Cases, promulgated May 7, 1934, 18 U. S. C., following Sec. 688.

FEDERAL STATUTE INVOLVED.

The Sixth Amendment of the Constitution, U. S. C. Annotated, Constitution, Sixth Amendment, Page 327:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense."

QUESTIONS PRESENTED.

1. (a) Whether the constitutional and statutory rights of the Petitioners were not infringed by the refusal of the Court to grant a further continuance for the purpose of permitting the Petitioners to obtain trial counsel.

(b) Whether the constitutional rights of the Petitioners were prejudiced by the failure of the Court to grant a continuance for the purpose of permitting the Petitioners to employ trial counsel.

STATEMENT OF THE CASE.

On November 13, 1945, the Petitioners were first brought to the District Court for arraignment (R. 53). At that time, they were represented by counsel, one Albert Smalholtz of New York, and were given until November 30, 1945, to file preliminary motions and obtain trial counsel, (R. 54). Apparently, not very much was done in the way of bringing the Petitioners to trial until May 31, 1946, when they were ordered to appear in Court on June 10, 1946, to answer an information containing forty (40) counts, (R. 54). The notice to appear on May 31, 1946, to answer the criminal information of forty (40) counts was by letter, (R. 55). It appears that between November 30, 1945 and May of 1946, that the District Attorney's office was contacted by Mr. Leahy, a member of the bar of the District of Columbia and it would appear that the District Attorney's office was of the impression that Mr. Leahy was representing the Petitioners. The reason for the delay in attempting to bring the case to trial earlier was to permit Mr. Leahy to complete the trial of a case which he was engaged in in the District of Columbia. On June 5, 1946, (R. 55), the District Attorney's office was notified by Mr. Leahy that he could not try the case on June 10, 1946, and requested a postponement, (R. 55). This postponement was refused by the District Attorney's office. On June 8, 1946, Norman S. Bowles, Jr., a member of the bar of the District of Columbia after having previously been in touch with the District Attorney's office, had a conference with Judge Coleman in his chambers and advised the Court that because he, Mr. Bowles, had been engaged as counsel to a Congressional Committee that he would be unable to appear for the Petitioners, (R. 51). Mr. Bowles in his statement to the Court on June 18, 1946, explaining his inability to represent the Petitioners, advised the Court that Mr.

Leahy on the very morning that Mr. Bowles was addressing the Court, June 18, 1946, stated that Mr. Leahy needed additional time to prepare the case or he would be compelled to withdraw from it (R. 53). At that time, the Assistant United States District Attorney stated that he understood that Mr. Leahy had withdrawn from the case, (R. 53).

The trial of the case was then continued by Judge Coleman until June 18, 1946, (R. 56). It would appear from an examination of the record that June 10, 1946, was the first time that the case had been assigned for trial or any definite date set since November 13, 1945, at which time the Petitioners were originally arraigned and were given until November 30, 1945, to file preliminary motions and obtain trial counsel.

On June 18, 1946, the Petitioners appeared in Court accompanied by Norman S. Bowles, Jr., and the appearances of Abraham Glasser and Edward A. Schaub, Jr., had apparently been entered. It is not clear from the record for what purpose Mr. Schaub appeared but it is abundantly clear that Mr. Glasser appeared for the sole purpose of filing a motion to the effect that the particular act under which the Petitioners had been indicted was unconstitutional. It also appears from the record that Mr. Glasser intended to ask the Court to stay proceedings pending an appeal to the Emergency Court of Appeals on this motion. On June 16, 1946, it would appear, was the first time that Mr. Glasser had entered the case, (R. 52). It also appears that between June 10, 1946, and June 18, 1946, a number of attorneys were contacted by the Petitioners and among them, Robert R. Carman. Mr. Carman, on June 19, 1946, was contacted and went to Court and indicated his willingness to appear, if a reasonable continuance was granted, (Appellants' brief, page 33 and 34). The case was tried on June 19, 1946, the Petitioners found guilty on thirty-one

counts, not guilty on nine counts. On June 24, 1946 the Petitioners were sentenced and are at present in the Federal penitentiary at Petersburg, Virginia.

It is the contention of the Petitioners that had they been granted this continuance, they would have had able counsel to appear for them and that the delay occasioned by this continuance would not have operated as a hardship against the Government and that the Court in refusing this continuance and in insisting on the trial proceeding without further delay, deprived the Petitioners of their constitutional rights as afforded them by the Sixth (6th) Amendment. The Petitioners further contend that, by being compelled to defend their cases themselves, they were materially prejudiced in that not being acquainted with the rules of procedure as well as the rules of evidence, a number of things happened in their trial which would not have occurred had they been represented by counsel. These matters are specifically referred to as being the opening statement by Mr. Spevak, one of the Petitioners, made on his own behalf, (R. 178), which brought about the remarks of the Assistant United States District Attorney, Mr. Kenney, (R. 181), which were:

> "(Mr. Kenney) I assume that was meant to be testimony. We have no objection because of the fact that he was not sworn, and are willing for it to be in the record as testimony, and we waive cross-examination.
>
> If you think it is advisable I will put on some testimony in rebuttal."

This in turn occasioned the remarks of the Court which appear (R. 182) and resulted in a witness, Jesse R. Sachse, being called by the Government, which witness could not have properly been called except to rebut testimony of Mr. Spevak and the Assistant District Attorney construed the opening statement of Mr. Spevak to be testimony which

was directly in conflict with the statement made by the Court at the beginning of the trial on June 19, 1946:

> "Following those opening statements,—which are not evidence but merely introductory statements * * *" (R. 112).

This was followed by the Government calling, at what would appear to be the insistence of the Court:

> (The Court) "Mr. Staffe was mentioned" (R. 187).

And following this, a Mr. Steffe was called, and it would certainly appear that these are one and the same person. This followed the introduction of photostatic copies of invoices which were permitted to be introducted and no objection made on behalf of the Petitioners. It is also true that no objection to the Assistant District Attorney's remarks relating to the opening statement of one of the Petitioners as well as the calling of these witnesses in rebuttal.

None of these occurrances would have taken place had the Petitioners been represented by counsel. If they had, proper and timely objection would have been made to enable this procedure to have been reviewed by the Circuit Court of Appeals.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred in failing to reverse the judgment of the Lower Court and award a new trial to the Petitioners and as all of the points, urged in support of the petition for the writ of certiorari, have been presented in the Statement of the Case, they will not be repeated here.

REASONS FOR GRANTING WRIT.

I. Misinterpretation of the decisions of this Court and conflict with the decisions of other Circuit Courts of Ap-

peals, specifically, United States vs. Bergamo 154 F. (2d) 31; and Johnson vs. Zerbst, 304 U. S. 458; Glasser vs. U. S., 315 U. S. 60.

II. Depriving the Petitioners of counsel as provided by the Sixth Amendment to the Constitution.

It is submitted that the failure and refusal of the District Court to grant the continuance requested by the Petitioners and their showing that they could have procured able counsel in that of Robert R. Carman, had a continuance been granted for a reasonable length of time, prejudiced the Petitioners and a review of the decision of the United States Court of Appeals for the Fourth Circuit is respectfully urged.

Respectfully Submitted,

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Attorneys for Petitioners.

BRIEF IN SUPPORT OF THE PETITION.

FACTS.

The facts have been fully set forth in the Petition and hence will not be repeated.

ARGUMENT.

Refusal of the District Court to continue the Case for the purpose of enabling the Petitioners to secure counsel to defend them as guaranteed them by the Sixth Amendment of the Constitution.

On behalf of the Petitioners, it is most urgently contended that they were not trifling with the Court below. The District Court, we submit, by reason of the fact that the Petitioners in their quest of counsel to aid and assist them in the defense of the charges brought against them by the Government felt that the efforts of the Petitioners were not sincere and were not real and that they were seeking means to delay the trial. We most respectfully submit that a painstaking and careful review of the events leading up to the trial will definitely erase this impression. Messrs. Spevak and Lerian were arraigned on November 13, 1945. They appeared through counsel and were allowed until November 30 1945, to file preliminary motions and to engage trial counsel. It can most reasonably be inferred that following this continuance, that the services of a Washington attorney had been obtained. This statement is more than supported, we submit, by the fact that no serious effort; or, in fact, any effort was made to bring the Petitioners to trial until on May 31, 1946, when they were notified by letter that their trial would take place on June 10, 1946. In the interval between November and May, the United States District Attorney's office had been in communication and contact with the office of Mr. Leahy. The case against the Petitioners was permitted to rest be-

cause Mr. Leahy was engaged in the trial of an important case in the District of Columbia. Surely it could not be said, nor could it be inferred that from November until May the Petitioners had trifled with the Court or that they had failed to engage counsel. After being notified on May 31, 1946 by letter that their case would be tried on June 10, shortly after that they apparently discovered that Mr. Leahy was unable to try the case on June 10, 1946. It certainly could be inferred that they had also secured the services of Norman S. Bowles, Jr., a member of the Bar of Washington in addition to Mr. Leahy. Mr. Bowles, apparently in the interval between May 31 and June 10, had been appointed counsel to a Congressional Committee and consequently he did not feel at liberty to represent the Petitioners in the actions brought against them by the Government. In response to Mr. Bowles request, the trial of the case was continued until June 18, 1946, a continuance of but a week, and in that space of time the Petitioners were permitted to engage trial counsel. It is certainly more than a reasonable inference from a careful and painstaking review of the record, that an effort was made by the Petitioners to employ trial counsel. Their efforts, however, were unsuccessful, but they did succeed in prevailing upon Mr. Carman to appear before Judge Coleman on June 19, 1946, and to assure the Court that he would undertake the defense of the case if permitted a reasonable opportunity to prepare it. Therefore, we respectfully state that a request for a second continuance upon the assurance of Mr. Carman himself, in person in Court, that he would undertake the defense of the Petitioners if permitted a reasonable length of time to prepare the defense, was concrete evidence of the fact that the Petitioners had done everything within their power to secure the services of able trial counsel and that they were not delaying their trial by interposing trifling excuses.

This Court has, in a number of cases, held that an accused person was entitled to the benefit and asistance of counsel as guaranteed by the Sixth (6th) Amendment of the Constitution. This amendment is not one of mere words. It was added to the Constitution for a specific and definite purpose. It was intended to insure persons accused of crimes of adequate protection so that no one would be imprisoned or fined without a fair and impartial trial, plus the advice and assistance of able counsel.

We respectfully submit that the decision of the United States Court of Appeals in the Fourth Circuit in the instant case is in direct conflict with the case of United States vs. Bergamo, 154 F. (2d) 31. In referring to the Sixth Amendment of the Constitution, the Court through Judge Biggs, on page 34, stated:

> "The Sixth Amendment provides inter alia that 'in all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense.' The Supreme Court has held that the right to the assistance of counsel includes the right to counsel of the Defendant's choosing. (See cases cited)".
>
> "There is no question but that the right to the assistance of counsel for defense means effective assistance. Assistance is not effective when counsel has insufficient time to prepare his defense. Here again the authorities are in agreement. (See cases cited)".

In the case of Powell vs. Alabama, 287 U. S. 45, this Court by reason of the fact that the Defendants were denied the right of counsel granted a new trial. Mr. Justice Sutherland, speaking for this Court on page 68, stated:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometime no skill in the science of law. If charged with crime, he is incapable, gen-

> erally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel in every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

This case clearly shows that this Court felt that unless a person was skilled in the science of law, that he could not adequately defend himself and that the employment and assistance of counsel was a necessary element to a fair and just trial.

In the case of Johnson vs. Zerbst, 304 U. S. 458, Mr. Justice Black, speaking for this Court on page 462, stated:

> "The Sixth Amendment guarantees that 'in all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense'. This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. Omitted from the constitution as originally adopted provisions of this and other Amendments were submitted by the first Congress convened under that Constitution as essential barriers against arbitrary or unjust deprivation of human rights. The

> Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recollection of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, ordinary and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter this court has pointed to '* * * the humane policy of the modern criminal law * * *'. Which now provides that a defendant '* * * if he be poor, * * * may have counsel furnished him by the state * * * not infrequently * * * more able than the attorney for the state'."

It is true that in the Johnson vs. Zerbst case, supra., the proceedings were by way of the writ of a habeas corpus hearing. This Court, nevertheless, stated in unequivocal terms that the Sixth Amendment was not a mere statement of idle words.

We submit that the instant case is quite easily distinguished from that of Avery vs. Alabama, 308 U. S. 444, and that of Betts vs. Brady, 316 U. S. 455. In the latter case, the accused and Petitioner had experience in the trial of cases having had a previous record before being tried in the Circuit Court of Charles County for the charge of which he was convicted.

We urge that the principles to be applied in the instant case are controlled by those applied in Glasser vs. U. S., 315 U. S. 60. In this case the Petitioner was an experienced attorney. He had engaged the services of competent counsel to represent him, but because the judge in the District Court appointed the same lawyer whom he had engaged,

to defend another person indicted together with Glasser over Glasser's single protest, a new trial was awarded. The United States Circuit Court of Appeals of the Fourth District, in its decision, laid considerable stress on the fact that the Petitioners had been trifling with the Court and that by their actions that they had waived the right to be represented by counsel. In the Glasser case, supra, Mr. Justice Murphy, speaking for this Court on page 70, stated:

> "To preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights. (See cases cited) Glasser never affirmatively waived the objection which he initially advanced when the trial court suggested the appointment of Stewart. * * * The fact that Glasser is an attorney is, of course, immaterial in a consideration of his right to the protection of the Sixth Amendment. His professional experience may be a factor in determining whether he actually waived his right to the assistance of counsel. (See cases cited). But it is by no means conclusive."

Again on page 75, in this same case, this Court speaking through Mr. Justice Murphy held:

> "There is yet another consideration. Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness.
>
> To determine the proper degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

The unfortunate dilemma of the Petitioners in the instant case was that they had many lawyers for special purposes, but had not been able to secure the services of one who would represent them where they need representation and assistance the most, to wit: trial counsel, when their cause was heard. Had there been a number of postponements, it could be said that they were guilty of trifling with the Court. Had they been unable to present to the Court able trial counsel who would represent them and had they merely advised the Court on the day that their case was to be tried, that they were unable to engage the services of trial counsel and had no reasonable expectation of obtaining such counsel, then it could be said that they were trifling with the Court. On the other hand, it was abundantly clear that these men had made frantic efforts to obtain trial counsel to defend them and had at last succeeded, but unfortunately for them, they were checked at the moment of their success because the District Court would not indulge the counsel that they had succeeded in obtaining, a continuance for a reasonable length of time to permit him to prepare the case.

CONCLUSION.

It, therefore, follows that the efforts which have been heretofore pointed out in some detail, operated to their distinct prejudice. Their failure to have counsel to assist at the trial resulted in the Assistant District Attorney construing and accepting the opening statement of Mr. Spevak as evidence and the Court permitted this. Having then accepted the opening statement of one of the Petitioners as evidence, the Court then permitted the Government to call witnesses to rebut an opening statement accepted as evidence by the Assistant United States District Attorney in the face of the fact that the District Court in

its opening remarks to the jury and to the Petitioners in outlining the procedure to be followed stated:

> "Following those opening statements,—which are not evidence but merely introductory statements * * *" (R. 112).

The Court permitted the District Attorney to call witnesses to rebut evidence which was, in no sense of the word, evidence, but which was merely an opening statement by a person unskilled in the practice or knowledge of law. Then followed the introduction of photostatic copies of invoices all of which operated materially to the prejudice of the Petitioners in this case and was certainly, in no small degree, responsible for the result that followed.

We most ernestly and most sincerely urge that the petition for this writ be granted.

Respectfully submitted,

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